

ORIGINAL

ORIGINAL

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April 6, 1992

APR - 6 1992

Federal Communications Commission  
Office of the Secretary

Ms. Donna R. Searcy  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Our File No.  
0715-114-63

Re: MM Docket No. 92-10  
Reply Comments of Ruth  
Communications Corporation

Dear Ms. Searcy:

Ruth Communications Corporation, permittee of WRWX(FM), hereby submits an original and four copies of its "REPLY COMMENTS" in the above-captioned proceeding.

Please contact the undersigned directly if there are any questions concerning this matter.

Sincerely yours,

  
David G. O'Neil

DGO:do  
Enclosures

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APR - 6 1992

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

Federal Communications Commission  
Office of the Secretary

In re

Amendment of Section 73.202(b)	)	MM Docket No. 92-10
Table of Assignments	)	RM-7865
FM Broadcast Stations	)	
(Sanibel and San Carlos Park,	)	
Florida)	)	

To: Chief, Allocations Branch

**REPLY COMMENTS OF RUTH COMMUNICATIONS CORPORATION**

Ruth Communications Corporation ("Ruth") hereby submits its Reply Comments to the Comments submitted by Sunshine Broadcasting, Inc. ("Sunshine").<sup>1</sup> Sunshine has failed to provide any basis for denying Ruth's request to permit Ruth to change communities of license for WRWX(FM) from Sanibel to San Carlos Park, Florida. In support thereof, the following is hereby shown:

**I. Introduction**

1. Ruth is the permittee of WRWX(FM), Sanibel, Florida. Ruth hereby incorporates by reference its Petition for Rule Making filed on October 22, 1991 ("Petition"), which led to the NPRM.<sup>2</sup> The petition describes in detail Ruth's diligent efforts over the past eight and one-half years to construct and operate WRWX(FM) on Channel 253A at Sanibel,

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<sup>1</sup> The Notice of Proposed Rule Making, DA 92-43 (Assistant Chief, Allocations Branch) (released January 28, 1992) ("NPRM") authorizes the filing of Reply Comments by April 6, 1992. Thus, Ruth's Reply Comments are timely filed.

<sup>2</sup> Ruth also filed Comments in this proceeding on February 19, 1992.

Florida and why concerns of federal, state, and local authorities have made it impossible for Ruth to operate WRWX(FM) at Sanibel. The only alternative is for Ruth to operate on Channel 253A at San Carlos Park. Changing the community of license of WRWX(FM) will permit Ruth to provide first local service to San Carlos Park in lieu of no service to Sanibel. The Commission agreed, concluding in the NPRM that Ruth:

" . . . has shown that it is unable to operate the station at Sanibel despite diligent efforts. Since Station WRWX(FM) has never been on the air, a change in community will not cause any disruption to existing service."

NPRM at ¶ 6.

2. Sunshine, licensee of WSUV, Fort Myers Villas, Florida, a potential competitor, filed comments opposing operation of WRWX(FM). Sunshine contends that Ruth has not proven that there are no alternative sites from which Ruth can serve Sanibel. Sunshine's rhetorical questions and unsupported assertions boil down to essentially four claims: (1) there are two sites proposed by applicants in another proceeding from which a city-grade signal over Sanibel could be transmitted; (2) there may be other sites on Pine Island not near eagles nests; (3) there are two existing towers on Pine Island north of Ruth's present site; and (4) there is an existing tower on Sanibel. As shown below, none of Sunshine's allegations provide any basis to conclude that suitable sites exist from which to serve Sanibel.

3. Ruth would note at the outset that Sunshine's comments consist of allegations with no factual support. Such comments do not warrant consideration, let alone constitute sufficient evidentiary support for the Commission to reverse its conclusion that a waiver of the Commission's restriction on removal of sole existing local transmission service is warranted in this instance. Sunshine's failure to provide any evidence of a suitable transmitter site to serve Sanibel undermines its arguments that a transmitter site is readily available.

**II. The Commission Correctly Concluded That It  
Is Not Possible to Operate A Station At Sanibel**

**A. Proposed Sites by Punta Rassa Applicants Are  
Irrelevant to the Use of Such Sites for Sanibel**

4. Sunshine asserts that two of the applicants in the Punta Rassa, Florida proceeding, MM Docket No. 90-106, have proposed sites from which Ruth would place a city-grade contour over Sanibel.<sup>3</sup> As a threshold matter, the successful applicant in the Punta Rassa proceeding has specified a site on the mainland and not on Pine Island. See Initial Decision, Punta Rassa, Florida, FCC 92D-1 at p. 22 (released January 10, 1992)

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<sup>3</sup> The rhetorical questions which Sunshine poses regarding the availability of these sites for Punta Rassa applicants are not material to this proceeding and need not be answered by the Commission. These questions may be moot in any event because the winning applicant in the Punta Rassa proceeding has proposed a site on the mainland.

(Chachkin, Administrative Law Judge); Exhibit 21.<sup>4</sup> That site and a similar site proposed by another applicant will not provide the required city-grade signal over Sanibel. See Exhibit 21. The remaining two applicants specified the same site on Pine Island.

5. As Sunshine concedes, an applicant for a new FM radio broadcast facility only needs reasonable assurance from the owner of the proposed transmitter site. Such a threshold showing provides no evidence that an applicant will be able to secure necessary zoning or other approval to build a radio tower. The grant of a construction permit generally is not conditioned upon any showing of local approval.

6. As Ruth explained in its Petition for Rule Making, in 1983 it had reasonable assurance of a transmitter site and a good faith belief that the site complied with local zoning ordinances. Five years later, however, Ruth discovered that during the interim period the City of Sanibel had rezoned Ruth's site as a wetland and refused to permit Ruth to construct an FM tower. Therefore, the fact that a party in another proceeding has proposed a site on Pine Island provides no factual basis on which to conclude that such a site would receive local zoning approval for tower construction.

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<sup>4</sup> In order to avoid confusion, exhibits are numbered consecutively from Ruth's Petition for Rule Making.

**B. Environmental Considerations Preclude  
A Site on Pine Island**

7. Sunshine is incorrect in its claim that Ruth may be able to construct a new tower on Pine Island, particularly in the southern portion of the island. In its determined efforts to find a suitable transmitter site, Ruth considered three sites on the island. Ruth rejected one potential site because it would not comply with the Commission's spacing requirements for a proposed upgrade for WXKT(FM). Petition at ¶ 12. The owner of the second site rejected Ruth's offer for the site. Id. Ruth's third site was rejected because of the site's proximity to an eagle's nest. Id. at 13-16. In particular, the site was located within a protected zone one mile from the nest. Id.; See Exhibit 5. Based on its experience with the local zoning and environmental authorities, the advice of Morris-Depew Associates, Inc., local experts on obtaining zoning permits, and its previous efforts to locate available sites, Ruth determined that no sites were available which would be consistent with environmental guidelines and which would receive the necessary zoning approval.

8. As shown in the Southern Eagle Nesting Site Map for the 1989-1990 nesting season, prepared by the Lee County Eagle Technical Advisory Committee ("ETAC"), there were at least thirteen eagle nesting sites existing on Pine Island, with six sites located on the southern portion of the island. See Exhibit 22. Each nesting site may include more than one eagle's nest. The referenced map, which is two years old, is

the most current map available to the public. ETAC will not provide its current maps of existing eagles' nests in order to avoid disruption of these nests by the public. Therefore, Ruth cannot chose a site on Pine Island with advance knowledge of the location of eagles' nests. Because of the large number of nests and the wide area in which a tower would not be permitted, Ruth would have to file multiple requests for additional sites in order to determine whether an eagle's nest is located within the proximity of the proposed tower. Even if Ruth could locate a site not presently proximate to an eagle's nesting area, Ruth's experience has shown that by the time a construction permit is granted for a new site, a new eagle's nest could have been established.

**C. Existing Towers North of Ruth's  
Present Site are Unacceptable**

9. Sunshine asserts that the existence of two towers on Pine Island north of Ruth's existing site proves that there are suitable sites for a tower on the southern portion of the island. Paragraphs 6-8, supra, and Ruth's Petition for Rule Making proves why local environmental concerns make it impossible for Ruth to construct a tower on Pine Island. As Sunshine concedes and as demonstrated in the attached engineering statement, the existing tower sites will not permit Ruth to place a city-grade signal over Sanibel. See Exhibit 21.

**D. The Existing Tower on Sanibel is  
Neither Suitable Nor Available**

10. Sunshine is incorrect that a 250 foot tower is available on Sanibel for operation as an FM tower. As Ruth described in its Petition at ¶¶ 18-19, the 250 foot tower on Sanibel Island is a cable television tower located in Sanibel Gardens and owned by Palmer Cablevision. The cable tower, which is grandfathered,<sup>5</sup> already includes several existing antennas and could not support any further antennas. In addition, an FM antenna on a cable tower at a cable head end would cause interference to cable subscribers. Because of these problems, Palmer Cablevision will not permit Ruth to construct and operate an FM antenna on their tower.<sup>6</sup>

**III. Allowing Competing Expressions of Interest For  
Sanibel is Contrary to the Commission's Rules**

11. Sunshine's suggestion that competing applicants be allowed to file expressions of interest for Sanibel is contrary to Commission's policy and yet another attempt to delay the commencement of operation of WRWX(FM). Section 1.420(i) of the Commission's Rules prohibits the acceptance of competing expressions of interest in the use of Channel 253A at

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<sup>5</sup> The local zoning officials for Sanibel Island will not permit construction of a new radio broadcast tower on Sanibel Island. See Exhibit 12.

<sup>6</sup> Ruth was more diligent than Sunshine and discovered a second existing tower on the mainland in Lee County, the Beasley tower, from which WRXK(FM) transmits. Unfortunately, this tower will not provide an adequate city-grade signal over Sanibel. Petition at ¶ 20.



San Carlos Park and does not require Ruth to demonstrate the availability of an additional class channel for use by such parties. NPRM at ¶ 7.

#### IV. Conclusion

12. Ruth's efforts to provide first local FM radio broadcast service to Sanibel have been exemplary. Ruth left no stone unturned in its attempts to find a suitable location for an FM tower or to operate on an existing tower. These efforts included attempts to locate a new transmitter site from September 1988 to the present and consideration of at least half a dozen sites. Ruth has retained an army of engineers, lawyers, and zoning experts to find a suitable site for WRWX(FM) to serve Sanibel.

13. Ruth has expended over \$250,000 in its efforts to construct a radio station at Sanibel. Mrs. Ray, the principal of Ruth, has left her job of 22 years as Vice President and General Manager of WMHE(FM), Toledo, Ohio, to move to Florida to construct and operate an FM radio broadcast station in Sanibel.

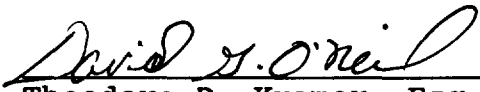
14. Ruth has been thwarted by forces beyond its control which make it impossible for Ruth to provide service to Sanibel. Ruth remains ready, willing, and anxious to provide such service but at this point the combined concerns of the local, state, and federal authorities regarding aviation, environmental, and zoning concerns make it impossible for Ruth

to provide service at Sanibel. Allotting Channel 253A at San Carlos Park, deleting Channel 253A at Sanibel, and modifying the construction permit of WRWX(FM), accordingly, will permit Ruth to provide FM broadcast service as Ruth has strived to do these past eight and one-half years.

WHEREFORE, for the foregoing reasons, Ruth Communications Corporation respectfully requests that the Commission reject Sunshine's comments and issue a Report and Order amending the FM Table of Allotments as specified in the Notice of Proposed Rule Making in this proceeding.

Respectfully submitted,

RUTH COMMUNICATIONS CORPORATION

  
\_\_\_\_\_  
Theodore D. Kramer, Esq.  
David G. O'Neil, Esq.

HALEY, BADER & POTTS  
2000 M Street, N.W.  
Suite 600  
Washington, D.C. 20036  
(202) 331-0606

Its Attorneys

April 6, 1992



**MOFFET, LARSON & JOHNSON, INC.**

5203 LEESBURG PIKE

CONSULTING TELECOMMUNICATIONS ENGINEERS

FALLS CHURCH, VA 22041

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ENGINEERING EXHIBIT

SUPPORTING THE

REPLY COMMENTS

OF

RUTH COMMUNICATIONS CORPORATION

IN RESPONSE TO

COMMENTS FILED BY

SUNSHINE BROADCASTING, INC.

IN

MM DOCKET NO. 92-10, RM-7865

April 6, 1992

**MOFFET, LARSON & JOHNSON, INC.**

5203 LEESBURG PIKE

CONSULTING TELECOMMUNICATIONS ENGINEERS

FALLS CHURCH, VA 22041

Ruth Communications Corporation

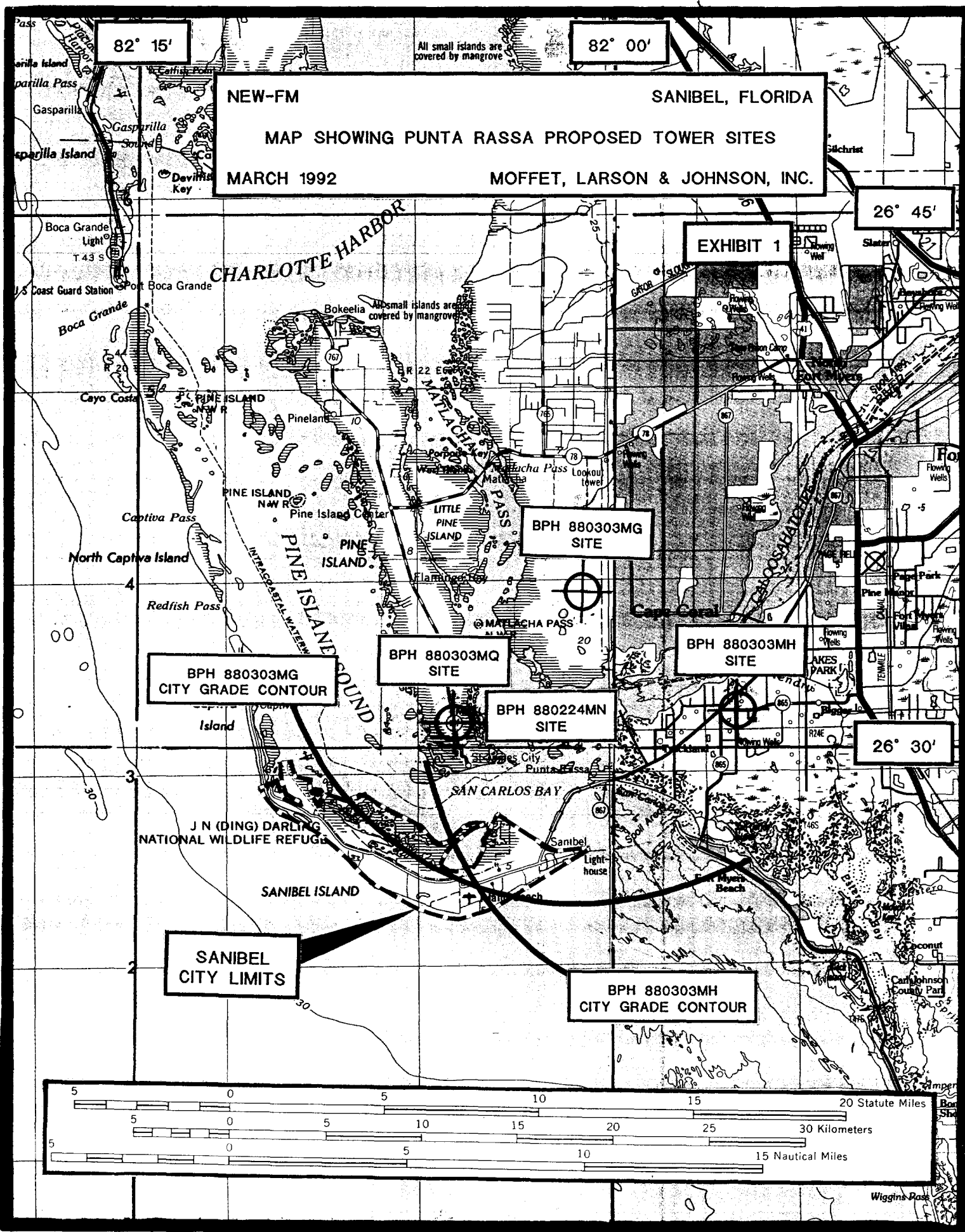
ENGINEERING STATEMENT

This Engineering Exhibit supports the Reply Comments of Ruth Communications Corporation in response to Comments filed by Sunshine Broadcasting, Inc. in MM Docket No. 92-10, RM-7865. In this proceeding Ruth Communications Corporation proposes to modify the construction permit for WRWX to specify San Carlos Park, Florida as the city of license and remove it from Sanibel, Florida. As previously demonstrated by Ruth Communications Corporation, this is necessary because of the inability to secure a transmitter site that will allow coverage of Sanibel with the 70 dBu contour.

In its Comments, Sunshine Broadcasting Corporation claims that two applications for Channel 249A at Punta Rassa, Florida, MM Docket No. 90-106 propose transmitter sites that would provide a city grade signal over Sanibel. Exhibit 1 shows the transmitter locations of the four applications for the Punta Rassa allotment. Two of the proposed transmitter sites, BPH 880303MG and BPH 880303MH, are located on the mainland of Florida. These respectively provide 70 dBu coverage of 42% and 34% of the city of Sanibel. This is well short of the Commission policy requiring 80% coverage of the city of license by the 70 dBu contour.

The transmitter site of the applications BPH 880303MQ and BPH 880303MN is located on Pine Island. As previously demonstrated in this proceeding, Pine Island cannot be used for a tower site because of environmental restrictions.

The FCC's Antenna Survey Branch tower data base indicates that two existing towers are on Pine Pine Island. These towers are located at N 26° 36' 32" W 82° 07' 20" and N 26° 38' 30" W 82° 08' 02". These tower sites and the maximum Class A 70 dBu contour from the sites are shown on Exhibit 2. As is evident from Exhibit 2, neither of these sites would provide the required 70 dBu coverage of Sanibel.



82° 15'

S Punta Gorda

82° 00'

NEW-FM

SANIBEL, FLORIDA

MAP SHOWING PRESENT PINE ISLAND TOWER SITES

APRIL 1992

MOFFET, LARSON & JOHNSON, INC.

EXHIBIT 2

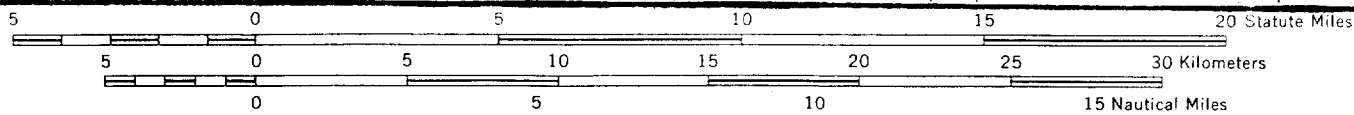
26° 45'

26° 30'

TOWER 1  
CITY GRADE CONTOUR

TOWER 2  
CITY GRADE CONTOUR

SANIBEL  
CITY LIMITS



**MOFFET, LARSON & JOHNSON, INC.**

5203 LEESBURG PIKE

CONSULTING TELECOMMUNICATIONS ENGINEERS

FALLS CHURCH, VA 22041

Ruth Communications Corporation

A F F I D A V I T

COUNTY OF FAIRFAX                   )  
  ) SS:  
COMMONWEALTH OF VIRGINIA        )

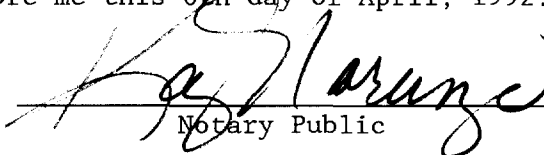
MICHAEL B. DEGITZ, being duly sworn upon oath deposes and says:

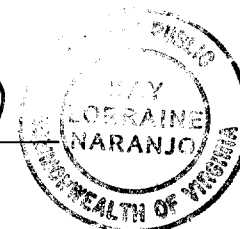
That Moffet, Larson & Johnson, Inc. has been retained by Ruth Communications Corporation to prepare this engineering statement;

That he has either prepared or directly supervised the preparation of all technical information contained in this engineering statement; and that the facts stated in this engineering statement are true of his knowledge, except as to such statements as are herein stated to be on information and belief, and as to such statements he believes them to be true.

  
\_\_\_\_\_  
Michael B. Degitz

Subscribed and sworn to before me this 6<sup>th</sup> day of April, 1992.

  
\_\_\_\_\_  
Notary Public



My Commission expires October 31, 1994.

My Comm. Exps.  
Oct. 31, 1994



**MOFFET, LARSON & JOHNSON, INC.**

5203 LEESBURG PIKE

CONSULTING TELECOMMUNICATIONS ENGINEERS

FALLS CHURCH, VA 22041

Ruth Communications Corporation

A F F I D A V I T

COUNTY OF FAIRFAX                    )  
  ) SS:  
COMMONWEALTH OF VIRGINIA        )

MARIANNA WOODSON COBB, being duly sworn upon oath deposes and says:

That her qualifications are a matter of record with the Federal Communications Commission;

That she is a professional engineer registered in the Commonwealth of Virginia and the District of Columbia;

That Moffet, Larson & Johnson, Inc. has been retained by Ruth Communications Corporation to prepare this engineering statement;

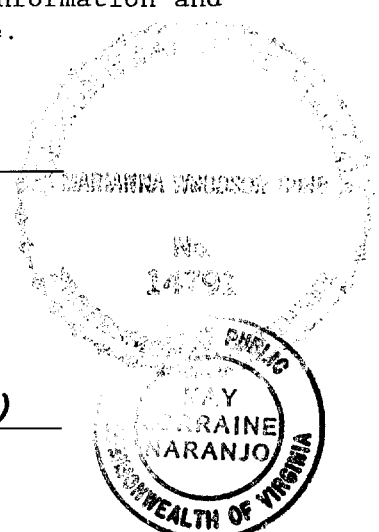
That she has either prepared or directly supervised the preparation of all technical information contained in this engineering statement; and that the facts stated in this engineering statement are true of her knowledge, except as to such statements as are herein stated to be on information and belief, and as to such statements she believes them to be true.

Marianna Woodson Cobb  
Marianna Woodson Cobb

Subscribed and sworn to before me this 6th day of April, 1992.

L. J. Arango  
Notary Public

My Commission expires October 31, 1994.



My Comm. Exps.  
Oct. 31, 1994



KATHLEEN S COPY



**CERTIFICATE OF SERVICE**

I, Stephanie A. Thompson, a secretary in the law offices of Haley, Bader & Potts, hereby certify that I have on this 6th day of April, 1992, sent copies of the foregoing "REPLY COMMENTS OF RUTH COMMUNICATIONS CORPORATION" by first-class United States Mail, postage prepaid, to the following:

\*Michael C. Ruger, Esq.  
Assistant Chief, Allocations Branch  
Policy & Rules Division  
Federal Communications Commission  
2025 M Street, N.W.  
Suite 8322  
Washington, D.C. 20554

Jerry Bellairs  
Sunshine Broadcasting, Inc.  
1400 Colonial Boulevard  
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Stephanie A. Thompson  
Stephanie A. Thompson

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\*Hand Delivered